Filed 9/30/03 P. v. Richard CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Appellant, v. JOSEPH LEE RICHARD, Defendant and Respondent.	B163964 (Los Angeles County Super. Ct. No. NA054002)

APPEAL from an order of the Superior Court of Los Angeles County, Joan Comparet-Cassani, Judge. Reversed.

Steve Cooley, District Attorney, Brent Riggs and Roberta Schwartz, Deputy District Attorneys, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Albert J. Menaster, Gregory Lesser and Mark Harvis, Deputy Public Defenders, for Defendant and Respondent.

The People appeal from the dismissal of a criminal action against Joseph Richard upon the granting of defendant's motion to suppress evidence seized in a parole search. We reverse.

BACKGROUND

Defendant was charged by information with possession of narcotics for the purpose of sale and possession of a firearm by a felon. He moved to suppress evidence pursuant to Penal Code section 1538.5.

At the hearing on defendant's motion, Long Beach Police Officer Anthony Anast testified that on August 21, 2002, he was contacted by other officers who were looking for a murder suspect based on information they had received that the suspect was "hanging out" at an apartment complex on East Artesia. At the complex, Anast observed a group of 10 men who appeared to be gambling in that they were in a circle, were cheering, money was on the ground, and dice were being thrown. The men were detained and patted down. Each was also asked if he was on probation or parole. Defendant stated that he was on parole. Anast verified that this information was correct. Defendant also said that he lived in the apartment complex.

Based on defendant's status as a parolee and Anast's knowledge that all parolees are subject to a search condition, Anast had defendant take him to defendant's residence, which was a couple of hundred feet away. Defendant at first showed Anast an empty apartment. Anast then placed defendant in handcuffs, and defendant admitted that he in fact lived in the apartment next door. Defendant's apartment was searched, yielding the evidence that defendant sought to suppress. Anast did not contact defendant's parole agent in conjunction with conducting the search, nor did Anast see or otherwise become aware of the specific conditions of parole that had been ordered for defendant.

Defendant's motion was granted. In so ruling, the trial court focused on Anast's lack of knowledge of defendant's specific parole conditions. In response to the prosecutor's argument that Anast had testified that a search condition was standard for all parolees, the trial court said: "Where is the hard evidence to that effect if that is the case with respect [to] this defendant? I mean you can set that forth as a general principle; but

the point is you have to have specific evidence that that is the case with respect to this defendant, and that's the evidence that's lacking." Later, the court stated: "[T]he transporting the defendant to his home and the entry into his home without consent is a violation of the defendant's right because there is no evidence before this court that there was a search condition on the defendant. It may be that that's normally the procedure; but I need to hear evidence that that, in fact, was placed on the defendant. So based on that, I'm granting the motion to suppress."

DISCUSSION

It is the law in California that "[a]ny inmate who is eligible for release on parole . . . shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." (Pen. Code, § 3067, subd. (a); see also Cal. Code Regs., tit. 15, § 2511, subd. (b)(4).) Therefore, defendant, whom the record establishes was a parolee, was subject to a search condition. (Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."].) We find no support for defendant's argument that the failure of the prosecutor to bring the search condition requirement to the trial court's attention constituted invited error in that the trial court, apparently also unaware of the law, asked for specific proof of defendant's conditions of parole. Accordingly, the trial court erred in concluding that such proof was required and in granting the suppression motion when that proof was not forthcoming.

Defendant contends that even if the trial court's reasoning was wrong, its order should nonetheless be affirmed because the search of defendant's residence was arbitrary, capricious and harassing. We disagree.

People v. Reyes (1998) 19 Cal.4th 743, 752, teaches that where, as here, "involuntary search conditions are properly imposed, reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." The court further noted that this rule "does not mean parolees have no protection. As explained in *People* v. *Clower* (1993) 16 Cal.App.4th 1737 [], 'a

parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.' (*Id*. at p. 1741; *United States* v. *Follette* (S.D.N.Y. 1968) 282 F.Supp. 10, 13; see *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 [] [a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee]; *People* v. *Bremmer* (1973) 30 Cal.App.3d 1058, 1062 [] [unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment].)" (*People v. Reyes, supra,* 19 Cal.4th at pp. 753–754.)

In *People v. Bremmer*, *supra*, 30 Cal.App.3d 1058, the defendant was stopped for speeding and driving with only one headlight. The officer who made the stop received information that the defendant was on probation for sales of dangerous drugs and that a search condition was part of the order of probation. The defendant confirmed to the officer that this was true. The officer then searched the defendant's handbag and found a restricted drug. (*Id*. at p. 1061.) The *Bremmer* court noted that "[w]hen a known probationer subject to warrantless search is discovered conducting himself in a manner that suggests a resumption of the misconduct that brought about the condition of probation, a peace officer may exercise the authority of a general search order to search." (*Id*. at p. 1065.) But "[u]nrestricted search of a probationer by any and all law enforcement officers at their whim and caprice is a form of harassment that amounts to an unreasonable search proscribed by the Fourth Amendment. [Citations.]" (*Id*. at pp. 1063–1064.) The court concluded that the defendant "had committed two ordinary traffic violations" (*id.* at p. 1067) that were themselves not susceptible to either search or frisk and that there was "nothing in the record sufficient to trigger a peace officer's suspicion . . . that probationer might be trafficking in dangerous drugs or might otherwise have lapsed into past misconduct." (*Id*. at pp. 1066–1067.)

This case is not *Bremmer*. The police encountered defendant at a place where they had information a murder suspect could be found. And while the nature of defendant's

criminal history that caused him to be imprisoned was not established, his conduct in gambling was a misdemeanor violation (Pen. Code, § 330), rather than a mere traffic infraction, and constituted conduct which would have been offensive to the law-abiding citizens who called the apartment complex their home. Accordingly, as the search was neither arbitrary, capricious nor harassing, the trial court was not compelled to invalidate the parole search on this basis.

Finally, we reject defendant's suggestion that we decline to follow *People v. Reyes*, *supra*, 19 Cal.4th 743, because a federal court has found it to be inconsistent with the United States Constitution. (*United States v. Crawford* (9th Cir. 2003) 323 F.3d 700, 708, 714.) We are bound to follow *Reyes*, federal law notwithstanding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see *People v. Sanders* (2003) 31 Cal.4th 318, 332.)

DISPOSITION

The order under review is reversed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.